STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK HOPKINS,

Defendant-Appellant.

UNPUBLISHED
December 18, 2003

No. 239734
Wayne Circuit Court
LC No. 00-012710

Before: Saad, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant appeals his jury trial conviction of assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1) and second-degree criminal sexual conduct (CSC II), MCL 750.520c. The trial court sentenced defendant to three to ten years in prison for the assault conviction and seven to fifteen years in prison for the CSC-II conviction. We affirm.

I. Prosecutorial Misconduct

Defendant contends that the prosecutor denied him a fair trial by making improper comments during opening arguments and by vouching for the credibility of a witness. Defendant did not raise these claims before the trial court and, therefore, the claims are unpreserved. As this Court recently explained in *People v McLaughlin*, ___ Mich App ___; ___ NW2d ___ (Docket No. 234433, issued 9/25/03):

> Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting the defendant's substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). To avoid forfeiture under the plain error rule, the defendant must demonstrate that: (1) an error occurred; (2) the error was plain, i.e., clear or obvious; and (3) the plain error affected the defendant's substantial rights. *Id.*, quoting *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).[1]

[1] The *McLaughlin* Court further observed:

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Defendant takes issue with the prosecutor's warning to the jury that the case would be "scary" for those who have or know children and his statement that the case would show "that our kids are not safe anywhere." This Court observed in *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995):

> Generally, "[p]rosecutors are accorded great latitude regarding their arguments and conduct." *People v Rohn*, 98 Mich App 593, 596; 296 NW2d 315 (1980),[2] citing *People v Duncan*, 402 Mich 1; 260 NW2d 58 (1977). They are "free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989). See also *People v Bigge*, 297 Mich 58, 68; 297 NW 70 (1941). Nevertheless, prosecutors should not resort to civic duty arguments that appeal to the fears and prejudices of jury members . . . .

The prosecutor's description of the crime as "scary" was neither inaccurate nor exaggerated. A prosecutor need not confine his argument to "the blandest of all possible terms." *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). In context, it also appears that the prosecutor was merely explaining to the jury that some testimony would be graphic and disturbing and that the jurors should not allow the testimony to upset them. Further, while the prosecutor's reference to children and their safety may have expanded the issue, at no time did the prosecutor ask the jury to disregard the evidence or decide the case based on the safety of children generally. Rather, the prosecutor went on to argue, in significant detail, the particular facts of the case and he asked the jury to base its verdict on the evidence presented. Moreover, were we to conclude that the prosecutor's brief remarks improperly appealed to the juror's fears, the trial court specifically instructed the jury that the statements and arguments of counsel are not evidence and should not affect the verdict.

We also reject defendant's claim that the prosecutor improperly vouched for the credibility of the victim. Generally, "the prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *Bahoda*, *supra* at 276. Clearly, the prosecutor made the comments about the victim's appearance on the stand to rebut defense counsel's argument that the victim "is extremely vulnerable to suggestibility" and that his testimony was inconsistent. The prosecutor did not place the prestige of his office behind the victim's testimony and did not suggest that he had special knowledge regarding the victim's truthfulness. *Id*. at 286-287. It is well settled that "[a] prosecutor may . . . argue from the facts that a witness is credible or that the defendant or another witness is not

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> The third requirement requires a showing of prejudice, meaning that the error must have affected the outcome of the lower court proceedings. *Schutte*, *supra* at 720. If the defendant satisfies these three requirements, this Court must then exercise discretion in deciding whether to reverse. *Id*. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant, or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id*.

[2] Overruled on other grounds by *People v Perry*, 460 Mich 55 (1999).

worthy of belief." *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1998). Moreover, the prosecutor's comment regarding the strength of the evidence presented was not improper because, again, the prosecutor did not suggest that he had some special knowledge by virtue of his position. *Bahoda, supra* at 286-287.

Finally, were we to find error here, defendant has clearly failed to demonstrate that he was prejudiced by these unpreserved claims. The evidence of defendant's guilt was overwhelming and any alleged error was not outcome determinative.

II. Sentencing

Defendant raises several claims regarding his sentence. Defendant contends that the trial court erred at resentencing by failing to consider his behavior in prison. We disagree. The trial court acknowledged defendant's prison adjustment, but ultimately decided that it carried no weight in its sentencing decision. Contrary to defendant's assertions, the trial court was not required to give defendant's post-conviction behavior dispositive weight. The trial court correctly considered the updated sentencing information, and did not deem the new information persuasive. Like the trial court, we fail to see a connection between defendant's security risk level and prison classroom progress and the punishment for the crime he committed in this case, the molestation of a child. Simply stated, not every example of positive post-conviction behavior warrants a lower sentence.

Defendant also maintains that the trial court misscored offense variable four (OV4), psychological injury to a victim. MCL 777.34. "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *McLaughlin, supra*. The trial court scored defendant at ten points because the victim's serious psychological injury may require professional treatment. While the record does not indicate that the victim received psychological treatment, MCL 777.34(2) specifically provides that "the fact that treatment has not been sought is not conclusive" for scoring OV4. The trial court relied on record evidence of the significant emotional trauma the victim endured at the time of the incident and his fears about how his male siblings would treat him after the sexual assault, implying a significant concern about issues related to his sexuality. "Scoring decisions for which there is any evidence in support will be upheld." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). The trial court properly assessed ten points for OV4.[3]

Additionally, defendant argues that the trial court abused its discretion by imposing a sentence in excess of the legislative guidelines range. "A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and

[3] We also note that, notwithstanding defendant's arguments regarding the Victim's Advocate report, the victim impact statement in defendant's presentence investigation report indicates that the victim stated that, after the assault, he had trouble sleeping, he described himself as "really upset" and "depressed," and stated that it was difficult to "get over" the experience. Clearly, there was no error in scoring.

compelling reason for that departure and states on the record the reasons for departure." MCL 769.34(3). In considering a trial court's decision to depart from the applicable guidelines range, we review for clear error whether a particular sentencing factor exists, we review de novo whether the factor is objective and verifiable, and we review for an abuse of discretion whether a reason is substantial and compelling to justify a departure. *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003). A substantial and compelling reasons is one that "keenly" or "irresistibly" grabs the Court's attention and is " 'of considerable worth' in deciding the length of a sentence." *Id*. at 257, quoting *People v Fields*, 448 Mich 58, 67; 528 NW2d 176 (1995).

The minimum guidelines range for defendant's second-degree CSC conviction was 36 to 71 months in prison. The trial court sentenced defendant to a minimum of 84 months in prison. The trial court stated that it departed from the guidelines because the guidelines do not adequately (1) account for the psychological injury to the victim or "the long-term psychological damage done to this child and his family," (2) "address the need to protect other children" from defendant, and (3) account for the manner in which defendant preyed on the victim in order to molest him.

We agree with defendant that the trial court erred by increasing defendant's sentence based on the "long-term" psychological damage to the victim and his family. Evidence of "long-term" psychological damage to the victim's family is not supported by any record evidence. Further, while evidence showed that the victim suffered emotional trauma at the time of the incident in October 2000 and when defendant's presentence investigation report was prepared in June 2001, the victim's psychological trauma was taken into account by the trial court's ten-point score for OV4, as discussed. No evidence was introduced to show that the victim may suffer severe and long-term psychological trauma so as to sentence defendant outside of the guidelines range. Were such evidence introduced, then the trial court could have properly considered this factor in the upward departure.

The trial court also ruled that the sentencing guidelines did not give adequate weight to the need to protect other children from this defendant, whose method of approaching and befriending a child in order to molest him justified the upward departure in this case. The need to protect other children from a defendant may be a reason for departure, *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001). Under the circumstances of this case, we cannot conclude that the trial court abused its discretion in finding defendant's conduct here a substantial and compelling reason for the upward departure.

Under these circumstances, while one factor for departure was not supported by the record, it is reasonable to conclude that the trial court would have departed and, indeed, would have departed to the same degree absent the impermissible factor. *Babcock, supra* at 270-271. It is clear that the trial court judge found defendant's behavior particularly chilling, in large part because he preyed upon a random child in a relatively public place, played with and befriended the boy, then attacked him in a bathroom stall with the threat of violence. "Because of the trial court's familiarity with the facts and its experience in sentencing, the trial court is better situated than the appellate court to determine whether a departure is warranted in a particular case." *Babcock, supra* at 268. Defendant's insidious method of gaining the trust of this young victim and ultimately secreting him and attacking him in a hotel bathroom raises significant concern regarding defendant's risk to other children.

Affirmed.

/s/ Henry William Saad
/s/ Jane E. Markey
/s/ Patrick M. Meter